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Supreme Court of the United States

OCTOBER TERM, 1927.

No. 163.

ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. RIGGS, *et al.*, etc.,

Plaintiffs-Petitioners,

against

THE NATIONAL BANK OF COMMERCE OF NORFOLK, VIRGINIA,

Defendant-Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals, for the Fourth Circuit, by Order Allowing the Certiorari, filed February 28, 1927.

BRIEF FOR PLAINTIFFS-PETITIONERS.

Statement of the Case.

This case comes here on a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit, granted by order filed February 28, 1927, on the petition of Arthur H. Lamborn, *et al.*, plaintiffs in the action.

The writ brings up for review a decision and judgment of the United States Circuit Court of Appeals for the Fourth Circuit rendered in the above entitled action on October 25, 1926 (15 Fed. [2d] 473) (which decision and judgment adhered to and applied the decision and

judgment of the said Court rendered in the action on October 21, 1924, reported 2 Fed. [2d] 23).

The said decision and judgment of the United States Circuit Court of Appeals, Fourth Circuit, rendered on October 21, 1924, Opinion of Circuit Judge ROSE, pages 74 to 86 (2 Fed. [2d] 23) reversed a judgment in favor of the plaintiffs Lamborn & Company upon a verdict directed by the District Court, Hon. D. LAWRENCE GRONER, District Judge, presiding (Rec., pp. 49 and 68), and ordered a new trial of the action.

Upon said new trial, which again came before District Judge GRONER, sitting in Norfolk, Virginia, judgment was rendered for the defendant-respondent herein, The National Bank of Commerce of Norfolk, Virginia, upon a verdict directed by the District Judge (Rec., p. 162), in conformity with the rulings of the Circuit Court of Appeals, Fourth Circuit, upon its reversal of the first judgment.

Plaintiffs-petitioners herein thereupon appealed from the judgment so directed to the United States Circuit Court of Appeals, Fourth Circuit, and the appeal was argued January 25, 1926, before Circuit Judges WADDILL, ROSE and PARKER (Rec., p. 206).

Said second appeal was decided October 19, 1926. The said judgment was affirmed in an opinion, again written by the late Circuit Judge ROSE (see Opinion, pp. 206-209).

In this opinion and decision the United States Circuit Court of Appeals, Fourth Circuit, adhered to and followed its decision and judgment on the first appeal.

This action was brought by the plaintiffs against the defendant Bank to recover damages (*i. e.*, the amount of a certain draft drawn by the plaintiffs) for its refusal to honor its letter of credit.

The letter of credit (Plaintiffs' Exhibit 23, p. 106) was as follows:

"THE NATIONAL BANK OF COMMERCE.

Norfolk, Virginia, May 11, 1920.

LETTER OF CREDIT No. 105.

Lamborn & Company,
132 Front St.,
New York.

We are establishing a credit in your favor through the Bankers Trust Company of New York under terms and conditions stipulated below.

Opened by.	T. S. Southgate & Company, Norfolk, Va.
In Favor of.	Lamborn & Company, 132 Front St., New York.
Amount.	Fifty three thousand, One Hundred twenty-three Dollars and eighty-four cents (53,123.84).
Covering.	1000 Bags (of about 224 lbs. each) 10 per cent more or less Java White Sugars at 22 cents per pound, less 2% duty paid f.o.b. cars, Philadelphia, Pa., landed weights.
Documents.	Sight draft with invoice and copy of Ocean Bill of Lading covering shipment Java to Philadelphia, and Order Notify Bill of Lading attached.
Shipment.	Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia.

Credit in Force. January 31, 1921.

This is to be regarded as an irrevocable credit. If impossible to comply with the conditions above stated, communicate with us before making ship-

ment. The conditions embodied in this credit must be adhered to, otherwise payment will not be effected.

Yours very truly,

(Signed) A. E. WHARTON,
Assistant Cashier."

Subsequent to its issue, this letter of credit was modified so as to eliminate therefrom the requirement contained in Paragraph entitled "documents," viz.:

"And copy of Ocean Bill of Lading covering shipment Java to Philadelphia,"

so that as amended the said paragraph read:

"Documents. Sight draft with invoice and order notify bill of lading attached."

(Plaintiffs' Exhibit 27, p. 107; Plaintiffs' Exhibit 47, p. 108.)

This letter of credit, payable at the office of the Bankers Trust Company, New York City, was issued by the defendant pursuant to a contract of purchase and sale between Lamborn & Company and T. S. Southgate & Company of Norfolk, Virginia (Plaintiffs' Exhibit X, p. 112 Rec.).

In performance of said contract and of the letter of credit in suit, as well as in performance of a number of other contracts of purchase and sale with other purchasers and letters of credit posted by other purchasers, Lamborn & Company caused to be shipped from Java in September, 1920 about 34,000 bags of Java White Sugar upon the S. S. *West Cheswald*, about 40,000 bags of Java White Sugar upon the S. S. *Chifuku Maru* and about 10,000 bags of Java White Sugar upon the S. S. *Washington Maru*, all of said bags of sugar being of the kind and quality called for in the said contract and in the said letter of credit (Rec., pp. 58, 109-111, 113-116, 119).

Upon shipment of the said sugar on the S. S. *West Cheswald* the authorized agents of said vessel in Java issued an ocean bill of lading therefor dated September 30th, 1920 (Plaintiffs' Exhibit 8, p. 114), which said ocean bill of lading contained the following notation:

> "Steamship West Cheswald, Port of Discharge New York, shipped by Ned. My. Voor Overzeehandel, consigned order, destination Port Said, option New York, party to be notified Messrs. Lamborn & Co., New York" (Rec., p. 116).

Lamborn & Company, having previously declared to Southgate & Company, as provided in said contract, the S. S. *Chifuku Maru* and the S. S. *Washington Maru* or substitutes, on December 13th, 1920, declared in substitution the S. S. *West Cheswald* (Plaintiffs' Exhibit 49, p. 121; Plaintiffs' Exhibit 50, p. 121; Plaintiffs' Exhibit 51, p. 122; Plaintiffs' Exhibit 52, p. 122 Rec.).

The reason for such substitution was certain information received by Lamborn & Company to the effect that the S. S. *Chifuku Maru* had met with an accident to her machinery which would delay her arrival (Rec., pp. 124-127).

In order to make delivery to Southgate & Company, Lamborn & Company caused the S. S. *West Cheswald* to be intercepted by radio, when two or three days off the Atlantic Coast, and to proceed to Philadelphia, Pa., instead of to New York, and there discharge her cargo (Rec., pp. 128-133).

The S. S. *West Cheswald* arrived at Philadelphia on or about December 16th, 1920, and unloaded the Java White Sugar consigned to Lamborn & Company; 1,000 bags of said sugar in good order and condition were selected, the landed weights taken, the duty paid thereon, and loaded free on board railroad cars at Philadelphia, and a railroad bill of lading issued therefor to the order of

Lamborn & Company, Norfolk, Va., notify T. S. Southgate & Company, Norfolk, Va. (Plaintiffs' Exhibit 16-A, p. 137).

On or about December 23rd, 1920, Lamborn & Company presented to the Bankers Trust Company in New York, their draft drawn under the said letter of credit for $48,009.81, together with invoices in duplicate, the said railroad bill of lading endorsed by Lamborn & Company in blank, weight certificate, and an affidavit of N. Nelson Keen, verified December 23rd, 1920, certifying that the sugar had been unloaded from the S. S. *West Cheswald* under ocean bills of lading dated Samarang, Java, September 30, 1920 (Rec., p. 134; Plaintiffs' Exhibits 18, 19, 20, 20-A, 21, 16-A, 17-A, pp. 134-137).

On said date there was an injunction in force procured by Southgate & Company restraining Lamborn & Company from collecting drafts drawn against the said letter of credit (Rec., p. 140).

Upon said injunction being vacated, and on or about January 6th, 1921, the Bankers Trust Company, acting upon the instructions of the defendant (Plaintiffs' Exhibit 36, p. 143; Exhibit 225, p. 145; Exhibit 228, p. 146), refused to pay the said draft, and on or about January 7th said draft was duly protested (Plaintiffs' Exhibit 30, p. 147).

At the conclusion of the plaintiffs' evidence, District Judge GRONER denied defendant's motion for a directed verdict (see Opinion, pp. 49 to 53, Rec.).

The defendant Bank then introduced certain documentary evidence, and on resting both plaintiffs and defendant moved for a directed verdict. The Court directed a verdict for the plaintiffs (pp. 67, 68, Rec.).

Defendant National Bank of Commerce of Norfolk appealed to the Circuit Court of Appeals, Fourth Circuit, from the said judgment, which Court reversed the judg-

ment and ordered a new trial, pursuant to the opinion of Circuit Judge ROSE, filed October 21, 1924 (pp. 74 to 86, Rec.; now reported 2 Fed. [2d] 23). Plaintiffs' petition for a rehearing was denied (p. 87, Rec.).

The cause thus went back for a new trial, which was had in Norfolk, Virginia, on June 4th and 5th, 1925, the proceedings whereon are found between pages 89 and 204, Record.

On this Second Trial certain additional evidence was offered by the plaintiffs and received; and certain additional evidence was offered by the plaintiffs and rejected. We make brief reference to both classes thus:

New Facts Brought Out by the Evidence Admitted Upon the Second Trial.

1. On or about December 27th, 1920, the defendant sent to the Bankers Trust Company the following telegram (Plaintiffs' Exhibit 36, p. 143, Rec.):

> "ANSWERING TELEGRAM WE HAVE CONVINCING EVIDENCE THAT SUGARS TENDERED BY LAMBORN WERE NOT SHIPPED FROM JAVA UNTIL OCTOBER SEVENTEENTH MARITIME RECORDS SHOW THAT SHIP ON WHICH LOADED SAILED FROM SAMARANG OCTOBER EIGHTH CALLING AT MASCASSAR THEN BORNEO AND FINALLY BACK TO SAMARANG FROM WHENCE SAILED FOR NEW YORK OCTOBER SEVENTEENTH FURTHER THAT THIS SHIP WAS DIVERTED TO PHILADELPHIA THOUGH ORIGINALLY INTENDED FOR NEW YORK **OUR CREDIT SPECIFICALLY CALLS FOR SHIPMENT FROM JAVA AUGUST OR SEPTEMBER AND LAMBORN'S FAILURE TO COMPLY WITH THIS IMPORTANT REQUIREMENT COMPELS US REFUSE PAYMENT MOREOVER OUR**

CLIENT HAS SHOWN US LETTERS INDICATING THEIR SUGARS LOADED ON STEAMER CHIFUKE MARU WHICH HAS NEVER ARRIVED." (Emphasis ours.)

Mr. Keen, one of the plaintiffs, who had called at the office of the Bankers Trust Company concerning the defendant's refusal to pay (Rec., p. 138), testified that he was not allowed to read the telegram in its entirety but that he saw it in the hands of one of the men at the Bankers Trust Company office. Mr. Keen recalled from reading the telegram at the trial that upon its exhibition to him only the question of clearance was brought up, and that he explained that the Lamborn contract did not covenant as to clearance (Rec., pp. 153-154).

2. On December 29th, 1920, the Bankers Trust Company sent the following night letter or telegram to the National Bank of Commerce at Norfolk (Plaintiffs' Exhibit 221, p. 139 Rec.):

> "Replying your telegram Southgate credit documents tendered by Lamborn in our opinion comply with terms of credit Lamborn have exhibited blading dated Samarang September thirtieth covering sugars per steamer *West Cheswald* out of which delivery to cars at Philadelphia was made which complies with August/September shipment clause your credit Do not know if sailing dates mentioned your wire refer this steamer However this is question of steamer clearance which point is not covered in your credit and must not be confused with date of shipment as indicated by date of blading. If steamer *Chifuku Maru* originally declared by Lamborn no doubt contract with Southgate gives them the right substitute other steamer All points mentioned your telegram are matter of contract between Lamborn and Southgate and do not concern terms your credit which have been complied with Injunction at present prevents Lamborn accepting

payment but similar injunctions easily vacated Unless you wire us to contrary will return documents to Lamborn notifying them you have instructed us as your agents under credit refuse payment. We and our counsel are of opinion Lamborn have strong case against you if payment refused This wire sent for your information and guidance Bankers Trust Company."

3. It will be noted, and we draw attention to the fact, that the Bankers Trust Company never stated to Mr. Keen that the form of the ocean bill of lading of the S. S. *West Cheswald* constituted any objection or irregularity. They had had this document in their possession on the 23rd of December, 1920. On the contrary, knowing its form and contents, the Bankers Trust Company stated in writing that the documents were in order.

4. In the course of a conversation between Mr. Keen, of Lamborn & Company, and Mr. Kent and Mr. Smith, Vice-Presidents of the Bankers Trust Company, on January 6th, 1921, after the injunction had been vacated, there was shown to Mr. Keen a copy of a telegram dated January 6th, 1921, from the Bankers Trust Company to the National Bank of Commerce of Norfolk, Virginia (Plaintiffs' Exhibit 227, p. 146, Rec.), reading as follows:

"JUDGE BURROUGH (error for Burr) HAS VACATED THE ORDER ENJOINING PAYMENT AGAINST PRESENTATION OF DOCUMENTS UNDER YOUR CREDIT ONE HUNDRED FIVE ORDER WILL BE ENTERED TODAY TO THAT EFFECT PLEASE REMIT FUNDS TO COVER AT ONCE AS THE DOCUMENTS ARE IN ORDER AND ANY DELAY IN NOT MEETING PAYMENT WILL BE MOST EMBARRASSING TO YOURSELVES AND OURSELVES."

5. Thereupon Mr. Keen testified as follows (p. 54, Rec.):

"Q. Did the Bankers Trust Company ever say to you that non-payment of this draft was because of the nature of the bill of lading of the cargo of the *West Cheswald?*

"A. No, sir, they did not.

"Q. Did you rely on the stated ground of non-clearance or non-shipment in time, August and/or September, from Java in your subsequent conduct of this matter?

"A. We did.

"Q. Could you have given sugar to the amount of a thousand bags to T. S. Southgate & Company? Could you have shipped F. O. B. cars a thousand bags of this sugar to T. S. Southgate & Company from the cargo of the *Washington Maru?*

"A. We could."

6. The ocean bill of lading of the S. S. *Washington Maru* was offered and received in evidence (Plaintiffs' Exhibit 235, p. 120), dated September 28th, 1920, covering 10,043 bags of sugar and covering transportation from Surabaya (Java) to Philadelphia, the goods being consigned to order notify Lamborn & Company, New York, and the bill of lading having been endorsed by the shipper to the American Foreign Banking Corporation, and by the American Foreign Banking Corporation to Lamborn & Company. The S. S. *Washington Maru arrived* in Philadelphia, Pa., on December 19th, 1920 (Rec., pp. 127-8, 156).

7. Upon Mr. Keen's cross examination, and again upon his redirect examination it was shown that between December 19th and December 26th or 27th, 1920, if Lamborn & Company had been informed by the National Bank of Commerce of Norfolk, Virginia, or by its agent in New York City, the Bankers Trust Company, of the alleged objection to the form of the ocean bill of lading of the S. S. *West Cheswald*, viz.: that at the time of shipment

that vessel was destined for New York or for Port Said, option New York, instead of Philadelphia originally, Lamborn & Company could in fact have delivered between those dates—December 19th to December 27th, 1920—to Southgate & Company the sugar from the S. S. *Washington Maru*, and could have presented to the Bankers Trust Company, prior to the expiration of the letter of credit, railroad bills of lading covering delivery to Southgate & Company of sugar from that vessel (Rec., pp. 154-157).

8. Thus, as the record now showed, the only objections which the defendant ever stated as a ground for its refusal to pay this draft during the life of the letter of credit and prior to action brought, were:

(a) Redeclaration of steamers, raised by Southgate & Co. (but the defendant bank's letter of credit contained no declaration clause), and

(b) Non-clearance of the steamer *West Cheswald*.

This was demonstrated beyond question by certain correspondence between the defendant and the Bankers Trust Co., which was offered in evidence for the first time upon the second trial.

These letters are:

> Plaintiffs' Exhibit 229, page 148, Rec. (Bankers Trust Company to defendant);
> Plaintiffs' Exhibit 230, page 151, Rec. (Defendant to Bankers Trust Company).

This latter letter dated January 22nd, 1921, from the defendant to the Bankers Trust Company, written while the letter of credit was still in force, is therefore highly significant as demonstrating the defendant's attitude at that time. We quote the following extract appearing on page 151:

"In order that you may clearly understand our position in regard to this particular credit, permit me to say:

"(1) This credit letter was made irrevocable only upon full compliance with the conditions of same.

"(2) Because there were conditions to be complied with, the instrument was non-negotiable. We were, therefore, advised by you that your interest in same was nominal or that of agent only.

"(3) In support of the client's contention that conditions of credit had not been complied with, there was submitted to officers and counsel of this bank five different shifting sets of declarations of shipment of this product, copies of which are herewith enclosed to you.

"(4) In connection with these papers unmistakable government evidence was also exhibited that shipment was not effected until eighteen days after date stipulated in fourth condition of credit letter.

"We submit, therefore, gentlemen, that there was justifiable evidence before us to warrant the action taken." (Emphasis ours.)

Then follow as annexes to this letter, copies of five notices from Lamborn & Company to Southgate & Company dated respectively August 30th, 1920, September 29th, 1920, November 10th, 1920, December 13th, 1920, and December 16th, 1920, which we set forth in full:

Letter dated August 30, 1920 (Plaintiffs' Exhibit 49, p. 121):

"We hereby declare that the steamships *Chifuku Maru* and *Washington Maru* or substitute will carry the 1,000 bags of Java Sugars purchased by you under contract dated April 23, 1920."

Letter dated September 29, 1920 (Plaintiffs' Exhibit 50, p. 121):

"We have received advices that the S/S *Chifuku Maru* carrying your Javas purchased under contract dated April 23, 1920, sailed from Java Aug. 22d, and is due to arrive the latter part of October."

Letter dated November 10, 1920 (Plaintiffs' Exhibit 51, p. 122):

"On Sept. 29th, we notified you that the steamer *Chifuku Maru* was due to arrive the latter part of October.

"We are now in receipt of advices to the effect that this steamer is not expected to arrive before the last half of November."

Letter dated December 13, 1920 (Plaintiffs' Exhibit 52, p. 122):

"On November 10, 1920, we advised you that the steamer *Chifuku Maru*, previously declared to carry sugars against the above contract, which was expected to arrive in Philadelphia the last half of Nov. 1920, had been unavoidably delayed owing to accident to her machinery, making it necessary to stop at Port Said, and at this writing we have received no definite information as to the sailing date from that port.

"In consideration of the above mentioned circumstances, we hereby declare the steamer *West Cheswald*, carrying the same quality of sugar, and having made the same shipment from Java, in fulfillment of your contract, which steamer is expected to arrive in Philadelphia this week."

Letter dated December 16, 1920 (Plaintiffs' Exhibit 230, p. 153, Rec.):

"Please be advised that the S/S *West Cheswald* is now in the Port of Philadelphia, with sugars to apply against your contract AB-522, dated April 23, 1920."

Evidence Offered for the First Time Upon the Second Trial, but Which was Excluded by the Court.

A. As to custom or trade meaning.

In support of the allegations of the plaintiffs' amended notice of motion for judgment, plaintiffs offered in evidence the depositions taken in New York City of William R. Bassett, Robert L. Goldsborough and Francis H. Goecker, all gentlemen of experience in the sugar business, and connected with concerns of national reputation, which were the most active in the importation of Java White Sugar in 1920.

The depositions of these witnesses, which are found in the record, pages 164-175, showed that in 1920 there was a long established and generally recognized custom among importers and buyers and sellers of imported sugar wherein and whereby the expression:

> "F. O. B. cars Philadelphia, Pa., landed weights, shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa."

meant and intended, and was understood as meaning and intending that the sugar sold was to be laden on board a steamer or steamers at or in a port or ports of the Island of Java on any day or days in the months of August and/or September, 1920, and thereafter to be carried by steamer or steamers to Philadelphia, Pa., and that delivery to the purchaser was to be made by placing the sugar free on board railroad cars at Philadelphia, Pa., and that the title and property right remained in the sellers until said delivery to the buyer at Philadelphia, Pa.; and that said words did not mean or require that the vessel or the goods carried thereon be destined for Philadelphia, Pa., at the time of shipment.

The testimony of these witnesses, if admitted, would have shown that in making delivery to Southgate & Company of sugar shipped on board the S. S. *West Cheswald* under the bill of lading in evidence, Lamborn & Company were doing precisely what their contract with Southgate & Company and the defendant's letter of credit called for, as the terms in such contract and letter of credit were understood by the persons engaged in that trade.

This evidence was excluded by the Court for the reason stated by it in granting the defendant's motion to strike out the allegations of the amended notice of motion for judgment, in support of which this evidence was offered (Rec., pp. 103-106 and p. 160).

B. As to T. S. Southgate & Company's alleged right of insurance under this contract.

United States Circuit Court of Appeals, Fourth Circuit, in its opinion on the first appeal, said (2 Fed. [2d], 23, at p. 27):

> "* * * just as in this case, although the title to the sugar was not to pass until its delivery f. o. b. cars Philadelphia, the buyer had an insurable interest in it, and, had the sugar market continued to advance, he might well have desired to insure *the gain he would make from his contract,* and insurance effected *on sugar from Java to Philadelphia would not have covered sugar on a ship bound for New York*" (Rec., p. 82). (Italics ours.)

We have italicized the foregoing lines so as to show that consideration of the subject-matter of insurance of profits or "gain," became at once and was turned into the very different question of the insurance of sugar aboard a certain ship or ships; whereas we contend that the purchaser's *insurance of profits* under a purchase and sale contract is and always has been a totally different thing from *insurance of the goods themselves* belonging

to the vendor. To establish this distinction of fact in the theory and practice of marine insurance, we adduced in the form of a deposition, the testimony of Richard Jones, to which we now beg leave to refer.

This deposition (pp. 176-200) showed that under a contract of purchase and sale such as existed between Southgate & Company and the plaintiffs, whereby goods were to be shipped from a foreign land during a certain period of time and placed duty paid, free on board cars in an American port, the purchaser had a right to take out insurance on profits the moment that this contract was made; that such insurance was provided for by settled forms, issued pursuant to the rules of maritime insurance brokers, adopted by the Board of Underwriters of New York, following the London Institute cargo clauses which had been in effect for a great number of years; that those forms provided for substitution of steamers—naming a new steamer from time to time; for diversion of steamers carrying the goods to be delivered to the purchaser; that a form of binder covering insurance of profits entitled "Underwriters and Brokers Emergency Agreement," contained clauses expressly providing for renaming steamers and for the diversion of a steamer (see form of binder printed at pp. 181-185, attached to Mr. Jones' deposition); that in respect to Southgate & Company's contract, if Southgate had taken out insurance of profits thereunder, the substitution of the *West Cheswald* for the *Chifuku Maru* would have occasioned no prejudice to such insurance, nor would the diversion of the *West Cheswald* to Philadelphia when bound for New York off the Atlantic Coast have been anything more than a mere matter to report to the underwriters; that indeed the underwriters would have welcomed such a substitution or diversion of the *West Cheswald*, a few hundred miles off the New

Jersey coast, in the place of a steamer that was delayed by an accident at Port Said.

The Trial Court, however, excluded this evidence (p. 162).

To the exclusion of the depositions of William R. Bassett, Robert L. Goldsborough and Francis H. Goecker as to custom or trade meaning, and the deposition of Richard Jones as to the theory and practice of insurance of profits under the contract between Southgate & Company and the plaintiffs, the plaintiffs excepted (pp. 160 and 162).

Upon the second trial District Judge GRONER feeling constrained by the decision and judgment of the Circuit Court of Appeals, Fourth Circuit, reversing the first judgment and ordering a new trial, now directed a verdict for the defendant Bank, respondent herein. His opinion is found on pages 162 to 164, Record.

The plaintiffs appealed from the judgment entered on said direction to the United States Circuit Court of Appeals, Fourth Circuit, where the appeal was argued January 25, 1926, and the judgment was affirmed by opinion and decision handed down October 19, 1926, to be found on pages 206, 207, 208 and 209, Record. The judgment of affirmance was dated and filed October 25, 1926 (p. 209). And on November 26, 1926, the mandate of the said Circuit Court of Appeals was issued to the United States District Court at Norfolk, Virginia (p. 209).

Thereafter, by order filed February 28, 1927, upon the petition of the plaintiffs-petitioners herein, this Court granted a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit, bringing the said judgments and the records thereof before this Court for review (p. 210).

POINT ONE.

Lamborn & Company's whole duty under this shipment clause was to cause the commodity to be loaded on board a steamer or steamers at a Javan port during August and/or September, 1920, and by such steamer or steamers to be carried in due course to the Port of Philadelphia, there to cause the net landed weight of the commodity to be ascertained, pay the duty and ship the specified quantity to this purchaser free on board railroad cars at Philadelphia (See Letter of Credit, Plaintiffs' Exhibits 1 and 2, pp. 8 and 9, Rec.). Plaintiffs-petitioners performed every one of these acts consecutively and without delay.

The United States Circuit Court of Appeals, Fourth Circuit, in reversing the first judgment misapplied the case of *Filley* v. *Pope*, 115 U. S. 213; and committed the further error of applying the principles of a c. i. f. shipment contract from foreign port to American port to a contract for shipment from a foreign port to an American port and delivery f. o. b. railroad cars at said American port.

The distinction between the two classes of contracts is wide and deep. In the first class of c. i. f. contracts, delivery to the ship at the port of lading is delivery to the purchaser. The goods are his from that moment, the bill of lading is his, the right to insure is his.

In the second class of f. o. b. contracts, delivery to the purchaser is not made until the goods are placed on board railroad cars American port of arrival. When loaded on the ship, the goods are still the sellers, he is responsible for the freight and has the sole right to insure the goods against sea damage or maritime casualty. We beg leave to discuss these errors in their order.

In holding that the case of *Filley* v. *Pope* (*supra*), was a controlling precedent against the judgment rendered in favor of the plaintiffs on the first trial, the Court below applied the judgment rendered in *Filley* v. *Pope* to a totally different contract.

It extended the doctrine of *Filley* v. *Pope* to an element of the contract which was not a condition precedent, not a description of the goods and not a thing as to which the parties had made the supposed covenant or warranty.

We have examined with great care every reported case in the Federal Courts where *Filley* v. *Pope* has been cited. We find it has never been cited in support of a construction like that involved in the decision of the Court below; that it has never been cited as an authority for holding that under an f.o.b. contract American port, there could be *implied* any obligation, warranty or undertaking on the part of the importer as to his own bill of lading or as to the original or primary destination of the ship which might carry his goods.

We submit that unless the alleged breach of the terms of the letter of credit in this case on the part of Lamborn & Company may be put in the same class, falls within the same classification of breaches of contract as the breach of the contract in *Filley* v. *Pope*, the latter case was not a controlling authority.

We are not for one moment contending that performance of a warranty or undertaking in a contract as to the *time* and *place* of shipment is not a condition precedent to recovery by the shipper or vendor. In *Filley* v. *Pope* there was a provision in the contract that the iron should be shipped from Glasgow. This was not done. All that this Court held in *Filley* v. *Pope* in substance and in law was that the words "shipment from Glasgow" were words descriptive of the goods; that said shipment was a condition precedent to performance by the shipper and

so that violation of that clause deprived him of the right to recover. All that was held by the House of Lords in *Bowes* v. *Shand* (2 App. Cases 455), was that the stipulation that the rice should be shipped March and/or April was a clause descriptive of the rice and that shipment of a part of it prior to the said months was a breach of a condition precedent and barred an action to recover the price.

No reported case has imported into a contract such as the Lamborn contract a condition precedent, and no reported case where the contract was silent on the question of direct or indirect voyage or course of the vessel has written into the contract a provision for a direct voyage.

On the contrary Courts have always avoided doing so. For it is equally true and sound that if the Courts have no right to disregard what is written in a contract, they have no power to write into a contract a clause which the parties did not introduce therein.

There is no clause in this letter of credit or in the purchase and sale contract whereby Lamborn & Company covenanted and agreed to any particular form of bill of lading, or to delivery by any particular ship or that the steamer or steamers which they might employ to make delivery should sail upon any designated or described voyage, or that they should touch or not touch at any intermediate port or ports.

The only provision in common in the contract in *Filley* v. *Pope* and the Lamborn contract was a single element found in the words stating and warranting *the place of shipment, Filley* v. *Pope* "shipment from Glasgow" and the Lamborn contract, "shipment from Java." It is a remarkable fact, which we beg leave to impress upon the attention of this Court, that there is no reported case to be found in the English or American Courts which holds where delivery was to be at a designated port of destina-

tion that one of the implied *obligations* of the seller was to procure a certain vessel, obtain a certain kind of bill of lading and see to it that the ship started at once for the ultimate port of destination or delivery, *where the contract was silent on all of these points.*

Here we think is found an indication of the error which has been made in applying the judgment in *Filley* v. *Pope* to the Lamborn contract. If Lamborn & Company had not made shipment from Java, it is not enough to say that they ought not to recover in this case; we can go further and say they would never have brought the case. There would not have been any case.

But all that *Filley* v. *Pope* holds is that by the contract in that case "shipment from Glasgow" was a material description of the goods and that as the seller did not make that shipment he had no suit. That was the judgment in *Filley* v. *Pope.* It has not been applied here to any failure on the part of Lamborn & Company *to ship from Java* when they had agreed to do so. If that had been the fact, then the case of *Filley* v. *Pope* would have been applicable and controlling. But it is true, we submit, that the decision in *Filley* v. *Pope* has been applied to a case where no such breach of contract occurred *and that in order to apply it,* it has been necessary to assume as major premises of the argument that there was a warranty or condition, that it was violated by Lamborn & Company and that said breach was of a condition precedent to performance. So that we claim that the ground and basis upon which *Filley* v. *Pope* has been applied to our contract had to be imported into this case, had to be assumed in this case and that they never existed really in fact.

This brings us to a short description of the nature of the Lamborn contract. What was that contract? It was a sale of sugar to the purchaser to be effected by delivery

to him f. o. b. cars, Philadelphia, U. S. A. Until and unless that delivery was made, the purchaser received no goods, obtained no title and was under no obligation to make payment. No time was fixed for the said delivery f. o. b. railroad cars. The sugar was described as Java white sugar and the contract provided that such sugar should be shipped from Java within a certain time (August or September, 1920) and carried by steamer or steamers to Philadelphia. This contract allowed Lamborn & Company to make said shipment at any time within two stated months, to make it at any port in the Island of Java, and it gave Lamborn & Company the right to transport the sugar from Java by one or a dozen steamers without regard to the quantity carried by any one of the ships. This contract on its face was an agreement that Lamborn & Company might use any number of ships. (*Pennsylvania Sugar Co.* v. *Czarnikow-Rionda Co.*, 245 Fed. 913, *Circuit Court of Appeals, Third Circuit.*)

The letter of credit was simply a replica of the contract with the provision for declaration of steamers omitted.

But this is exactly what we did. We shipped this sugar at Java. We shipped it within the stipulated time. It was loaded on board steamer. That steamer carried it to Philadelphia.

And yet it has been held that we broke this contract. The inquiry is, where was the breach? What part of the written contract and letter of credit did Lamborn & Company violate? What words, what clause, what provision of the contract could be pointed to as having been violated? Obviously none. Therefore, we say that the alleged violation discussed in the opinions below is *one which has to be assumed.* What is the alleged violation? That the bill of lading of the steamship *West Cheswald* read "Port Said, option New York" and that when the

ship sailed from Java she was headed for Port Said and afterward for New York.

But there is nothing in the contract or letter of credit which bound Lamborn & Company to any particular steamer. There is nothing in the contract or letter of credit which bound Lamborn & Company to any particular form of bill of lading on their own sugar. There is nothing in the contract or letter of credit which bound Lamborn & Company so to govern the course of the steamer or steamers carrying the sugar that it or they should make a direct voyage from Java to Philadelphia.

> "Some point is made by the appellant of the fact that the *West Cheswald* was originally bound for New York and diverted to Philadelphia. We think this diversion was of no consequence, under the contract. Plaintiff was concerned only with the delivery of the merchandise, that there should be no delay in its arrival. It was delivered as a result of a continuous voyage from Java to Philadelphia. These contracts do not say that the sugar shall be shipped by continuous voyage from place of shipment to destination, what they provide is that the shipment shall be 'from Java by steamer or steamers to Philadelphia'; even if they did so provide, we might not be prepared to hold, under the facts here appearing, that the voyage was in reality a continuous one, although the first destination of the ship was New York, that this latter circumstance would avoid the contract."
>
> (Schaffer, J., reading for the Court in *H. O. Wilbur Sons Inc.* v. *Lamborn et al.*, 276 Penn. State, 479.)

In order to spell out a breach of warranty it is perfectly apparent that there must be written into this contract, clauses affecting the steamer, the bill of lading and the voyage of the ship, which were not in the contract

when the parties signed and delivered it. There is nothing in this contract to the effect that Lamborn & Company could not have transshipped this sugar at Port Said or off the coast of New Jersey or at New York (or Norfolk), nothing in the contract making it unlawful for the carrying steamer to put into New York. If the steamer had put into New York and then gone on to Philadelphia, Lamborn & Company would have performed their contract, which was in its entirety to ship this sugar at Java within a certain period of the calendar and then transport it to Philadelphia by steamer or steamers. So our complaint of the judgment of the Court below is this: that in order to apply *Filley* v. *Pope* to our case, the Court was compelled to assume a condition precedent in order to apply it.

A case which is an example of the effort to import into the contract, a clause as to the return voyage which was not in the contract, is *El Dorado Oil Works Co.* v. *Société Commerciale de L'Oceanie*, 182 Fed. 195. In that case the goods bought and sold was a cargo of Tahiti copra. The contract appears to have read as follows: "The Société Commerciale de L'Oceanie agree to deliver in sacks or in bulk, their option, and the El Dorado Oil Works Co. agree to receive a full cargo of Tahiti copra of fair average quality, tale quale on quay in San Francisco, per 'Brig Lurline,' now en route from Puget Sound to Taiohae and/or Papeete what the vessel loads, estimated to be about 350 tons." There are other parts of the contract which we do not quote. See the fine print, page 196. Now it appears that the brig sailed to Taiohae and thence to Papeete where she arrived on December 1st, 1907. At that port she loaded part of her cargo of copra and on December 17th she sailed for a voyage back to Taiohae where she completed the loading of her cargo of copra on January 20th, 1908. On the arrival of the vessel and her

cargo at San Francisco, the purchaser refused to take the goods and the ground of the refusal was that the voyage stipulated for in the contract was from Papeete to San Francsico "and did not permit her to return to Taoihae after having once touched there on the way to Papeete, and that her return voyage should have been from the last named port to San Francisco and that she should so return without deviation was a warranty necessarily and legally implied in the terms of the contract."

The Circuit Court of Appeals, Ninth Circuit, declined to adopt this reasoning, saying:

> "But the contract, as we read it, does not describe the return voyage, nor does it specifically name a port or ports of loading. It simply provides that the defendant in error shall deliver a cargo of Tahiti copra of fair average quality on the quay in San Francisco per brig Lurline, described to be 'now en route from Puget Sound to Taiohae and/or Papeete.' It is silent as to where the cargo was to be obtained, or as to what the return route should be."

And so we say that our contract is equally silent as to the port or ports in Java where this sugar was to be shipped or loaded on board steamer or steamers and as to the voyage or route which said steamer or steamers were to take in delivering the sugar on the pier at Philadelphia. We assert that our only obligation was to load this sugar at Java, to make shipment at Java within the time as specified by the contract and thereafter without undue delay and by a natural course make delivery f. o. b. railroad cars at Philadelphia, after unloading the sugar from the steamer or steamers which had brought it to that port. And that any other construction of the contract implies and absolutely demands that new and additional clauses be introduced therein by the Court.

We submit that this construction of our contract is sustained by the decision of this Court in *Harrison* v. *Fortlage*, 161 U. S. 57—a case which must have had great consideration not only from the eminence of counsel (Mr. John G. Johnson of Philadelphia and Messrs. William Allen Butler and Wilhelmus Mynderse) who argued for the respective parties, but because the case was argued on November 13th, 1894, and it was not decided until March 2nd, 1896. Mr. Justice GRAY also wrote this opinion. He said:

> "The single question is whether the contract between the parties required all the sugar to be brought to Philadelphia in the Empress of India, upon which it was originally shipped. This depends upon the meaning of the terms of the writing in which the parties must be assumed to have embodied and expressed their whole intention, and to have defined all the conditions of the contract. The Court is not at liberty, either to disregard words used by the parties, descriptive of the subject matter, or of any material incident, or to insert words which the parties have not made use of."

There was a contract which contained these words: "shipping or to be shipped during this month from the Philippines to Philadelphia per steamer *Empress of India*, etc."

Our phrase is "from Java by steamer or steamers to Philadelphia." The Supreme Court of the United States held: "a contract 'to ship by' a certain vessel for a particular voyage ordinarily means simply 'to put on board' *not including the subsequent carriage* and there is nothing in this contract to show that a different meaning was in the contemplation of the parties."

And again this Court said:

> "The sugar in question having been put on board the Empress of India and the conditions of the contract thus satisfied so far as that ship was concerned, the subsequent transportation and delivery of the goods were to be governed by the general rules of the maritime law."

In the *Harrison* case the whole quantity of sugar was not even brought to Philadelphia from the Philippines, by the *Empress of India*, for that vessel discharged 700 tons of the sugar in the Island of Bermuda whence it was carried to Philadelphia by another steamer. Obviously under a new bill of lading from Bermuda to Philadelphia.

We claim that this decision of the Supreme Court is on all fours with our case and with our contract, and that this case is the controlling authority and not the decision in *Filley* v. *Pope*.

In *H. O. Wilbur & Sons, Inc.* v. *Lamborn*, 276 Pa. 479, Mr. Justice SCHAFFER (reading for the Court) said at page 486:

> "It cannot be doubted that had the sugar on the *Chifuku Maru* been transhipped to another vessel, and been by it delivered, plaintiff would have been bound to accept delivery. This was ruled in Harrison *v.* Fortlage, 161 U. S. 57. That case has an important bearing on the one under consideration, because what took place with reference to the sugar in question, while not actually, was in result, the equivalent of a transhipment. It holds that a contract for the sale of goods, to be shipped during a particular month from the Philippines to Philadelphia, by a named steamer, at a certain price ex ship, 'no arrival, no sale,' with a further provision, that if, by any unforeseen accident, the named vessel is unable to load, and no other steamer can be procured within the month, the contract is to be

void, does not require the goods to be carried to their destination by the vessel named, but is satisfied if the goods are put on board of her at the Philippines, at the time specified, and upon her being so injured on the voyage by the perils of the sea as to be unable to carry them, they may be transhipped and forwarded by another steamer to the port of delivery. It could not be seriously contended that had the *Chifuku Maru* and *West Cheswald* been proceeding together at the time of the injury to the former's machinery, that the *Chifuku Maru* would have had to tranship sufficient of her cargo to the *West Cheswald* in order that defendants might meet the requirements of their contract, when the latter vessel had on board precisely similar merchandise which could be delivered to plaintiff. In the realm of the practical, what difference could it make to plaintiff so far as delivery is concerned, that the same sugar, shipped in time, was tendered to it on another steamer?"

The technicality sought to be introduced into this case by counsel for the respondent bank has much less to rest on than the objection raised in the case known as *In re: An Arbitration Between Lewis & Peat, Ltd., and Catz American Co., Inc.*, Kings Bench Division, Divisional Court, Decided May 11, 1927; reported 28 Lloyds List Law Reports, page 51, before Lord Chief Justice HEWART, Mr. Justice SHEARMAN and Mr. Justice MACKINNON. See also 26 Lloyds List Law Reports, 263.

By the contract Lewis & Peat, Ltd., agreed to sell and deliver to Catz American Co., Inc., thirty tons of Lampong Pepper to be shipped "by steamer or steamers from Batavia and/or Lampong District Ports to New York" at a certain price per ton c. i. f. New York. The goods were shipped at Batavia on September 28th, 1925, on the *Fuji Maru* under a bill of lading dated that date in which the destination was stated as being Baltimore. Subsequent

to the date of shipment a clerk, presumably of the shipping company, indorsed on the bill of lading that the goods were to be delivered in New York. The bill of lading so altered and modified was tendered in New York in March, 1926, and was rejected by the buyer. The report continues:

> "Mr. Willink now said that the case raised the short point whether the bill of lading was good tender. The contract was for the sale of thirty (30) tons of Lampong Pepper. Documents were tendered in New York, including a Baltimore bill of lading, which was subsequently altered to say that delivery was to be made at New York and not at Baltimore as originally stated. Tender was refused on the ground that the bill of lading was not a good tender. The only objection taken to the bill was that it had been so altered.
>
> "Mr. Russell Davies submitted that the bill was bad under the terms of the contract. The obligation in the operative part of the bill as altered was still to deliver at the port of Baltimore. The indorsement by a clerk on the bill that the goods were to be delivered in New York did not so change the bill as to make it a New York bill and not a Baltimore bill of lading. All that the bill amounted to was a guarantee by the ship, assuming that the clerk's indorsement was authorized, that the goods would be discharged at New York.
>
> "The Lord Chief Justice, in giving judgment, said: This is a special case stated for the opinion of the Court under Sec. 19 of the Arbitration Act, 1889. The question for the opinion of the Court is whether or not a bill of lading dated September 28th, 1925, was a proper tender. In our opinion that question is to be answered: 'Yes, it was.'"

The case of *Bennett* v. *Lewis*, 212 App. Div. 641 (Supreme Court of the State of New York, First Department) illustrates how the courts refuse to defeat contracts because of such refinements.

There plaintiff agreed to sell and the defendant to buy one carload of bleaching powder shipment "from the works." The plaintiff's works were at Solvay, New York. Shipping instructions were to be given by the defendant. On October 13th, 1920, defendant instructed plaintiff to make shipment "Via D. & H. Ticonderoga Village R. R. To order of John D. Lewis, Ticonderoga, New York. Notify The Ticonderoga Pulp & Paper Co., Ticonderoga, New York."

The carload of bleaching powder which the plaintiff tendered under this contract had been shipped from the works to Philadelphia during the contract period October, 1920, where they were transferred to another car and consigned for delivery as called for by the defendant under the contract; so that the shipment proven was not a shipment from the works to Ticonderoga, but a shipment from the works to Philadelphia and thence to Ticonderoga.

There was judgment for the plaintiff which was affirmed by the Appellate Division, First Department, MARTIN, J., saying:

> "The contract did not call for direct routing to Ticonderoga. The question of routing seems to be immaterial inasmuch as it did not prevent prompt delivery."

Perhaps the underlying error involved in the opinion of the Circuit Court of Appeals, Fourth Circuit, is in failing to visualize and comprehend the exact nature of the plaintiffs' obligation. This, as we have pointed out, was not confined to a single act to be performed at some port in Java. It was constituted of a series of acts, thus: Shipment of the sugar on board steamer at Java; such shipment to be by loading on board in August and/or September, 1920; the vessel was to be a steamship or one or more steamships; and the sugar was to be carried to

Philadelphia on such steamer or steamers; there it was to be unloaded and the gross and net weight thereof taken upon being landed; the customs duty was to be paid to the American Government; and the sugar in bags, weighing about 224 lbs. each was then to be loaded on cars without expense to the purchaser (free on board) and consigned as was written, thereby for the first time becoming the purchaser's goods.

All of these things had to be done by Lamborn & Company in order to perform this contract. It all was a process of delivery, a continuity of action. But the Court below seemed to have considered it as a single act and its entire nature, conduct and effect to be weighed and governed by an ocean bill of lading belonging to Lamborn & Company, issued at Java to Lamborn & Company's vendors.

But this Court has recently held that shipment from one country *to* another does not consist of an isolated act, at the place of inception, *i. e.*, loading on board carrier or delivery to carrier. We refer to *United States* v. *Freeman*, 239 U. S. 117.

That was an indictment under Section 240 of the United States Criminal Code, making it a punishable offense knowingly to "ship or cause to be shipped from one state, * * * into any other state, * * * or from any foreign country into any state, * * *" any package of or containing intoxicating liquor of any kind, "unless such package be so labelled on the outside cover as to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein." The indictment was returned in the District of Kansas and charged the defendant with violating the statute by a shipment of liquor from Joplin, Missouri, into Cherokee County, Kansas. By a motion to quash and a demurrer it was objected that the offense denounced by the statute became complete when the package was delivered for shipment to the car-

rier, and therefore that the offense charged was not cognizable in the District of Kansas but only in the Western District of Missouri. The District Court granted the motion, and the Government appealed to this Court.

This Court reversed the judgment, saying at page 120:

> "As usually understood, to ship a package *from* one State *into* another or *from* a foreign country *into* a State is to accomplish its transportation from the one into the other by a common carrier, and is essentially a continuing act whose performance is begun when the package is delivered to the carrier and is completed when it reaches its destination. We think it is to such an act that the statute refers. To reach a different conclusion the word 'ship' must be read as if it were 'deliver for shipment.' No doubt it sometimes has that meaning, but it plainly is not so used in this instance."

This case, we submit, is very much in point. In the first place, the phrase "ship from one state into any other state" or "ship from any foreign country into any state" is very similar to our expression "Shipment from Java by steamer or steamers to Philadelphia." The word "to" used in this sentence does not greatly differ from the meaning of the word "into."

Yet in the cited case this Court repudiated the theory of the Court below that the act of "shipment into" was completed when the goods were delivered to the carrier, and considered the expression as referring to a continuing act, *i. e.*, the loading on board a common carrier and its transportation into one of the states.

We beg leave to add a few paragraphs on the other fallacy in the opinions of the Court below in applying the rules of law applicable to the construction of contracts, cost, insurance and freight, known among merchants as c. i. f. contracts.

Everyone knows that in those contracts there is always a stipulated voyage. That must be because the buyer becomes the owner of the goods on lading. He must take out effective insurance or it must be taken out for him *on the goods as owner*, on a named ship, for a certain voyage from port to port, and it is a commonplace that if the terms and conditions of such a policy of insurance are violated, the contract is at an end, and cannot be enforced by the assured.

The English Courts have pointed out that the rules of law applicable to c. i. f. contracts are peculiar to those contracts and cannot be applied elsewhere; and the cases cited by the Court below from the English Courts were all c. i. f. contract cases with one exception, and that exception was where the violation by the sellers of the contract was like that in *Filley* v. *Pope*, a violation of the time or place of shipment.

Thus *Landauer & Co.* v. *Craven & Speeding Bros.*, Law Reports, K. B. Div., Vol. 2, 1912, page 94, was a c. i. f. contract and is discussed as such by the King's Bench.

Hansson v. *Hamel & Horley, Ltd.*, 2 App. Cases (1922), page 36, was also a c. i. f. contract and the discussion in the House of Lords was as to the necessary requirements of performance by the seller of his obligations under a cost, insurance and freight, contract, as is well shown in the following remark by Lord Sumner who said:

> "The arguments of counsel on both sides in the case of *Landauer & Co.* v. *Craven & Speeding Bros.* show that Cox, McEwan's case was understood not to turn on any question of the shipping documents which are required by c., f. and i. terms in general, and I do not think that this case can affect the present appeal,"

meaning, we submit that authorities on cases not cost, freight and insurance contracts were not applicable to

said contracts and conversely that authorities on cost, insurance and freight contracts were not applicable to contracts of a different nature.

Furthermore, as to the case of *Ashmore & Co.* v. *C. S. Cox & Co.* (Law Reports, Q. B. Div., Vol. 1, 1899, page 436), we would point out to this Court that that was a case not on a c. i. f. contract but where the seller had failed to make shipment, that is, to load on board a sailer or sailers *within the specified time.*

But it is interesting and illuminating that Lord Chief Justice RUSSELL in that case intimated that the sellers, if they could find a ship in the Port of London which had made the designated shipment, might substitute and deliver off the ship so found. The Lord Chief Justice said:

> "On November 4th the defendants for the first time wrote saying that they were not in a position to make any other declaration than the declaration of the ship Dulwich. Up to that time it would have been open to the defendants, as I conceive, had the circumstances of the trade permitted of it, to have got hold of any other shipment, if there were any such, of Manila hemp by sailer or sailers, shipped between May 1st and July 1st, and applied such shipment to the contract in question."

Precisely, we beg leave to point out the ruling of the Supreme Court of the State of Massachusetts in *Mann* v. *The Eastern Sugar & Products Co.*, 244 Mass. 100.

But if under a contract *not* c. i. f. the sellers having no ship of their own or no cargo of their own could go about the Port of London and find some other ship or some other cargo which had made the shipment at the time and from the place required by their contract and therewith make good delivery, what becomes, may we ask, of the supposed implied warranty that the seller must load the cargo by a bill of lading to the designated port and

see to it that the ship sails direct from the port of shipment to the port of destination? No such rule as this has ever been laid down in an American Court other than in the case at bar, and the existence of such a rule is clearly negatived by the remarks of Lord Chief Justice RUSSELL above quoted, as well as by the decision of the Supreme Court of Massachusetts in the *Mann* case, *supra.*

Except for the decision of the Fourth Circuit in the case at bar, every reported case in the United States and in England, where the subject-matter of the controversy was a contract f.o.b. named American or English port, has uniformly upheld the right of the importer to make delivery from any ship which reached the port or was in the port, provided she carried the stipulated goods and that they were shipped in the agreed foreign country, that is, laden on board, within the agreed period of time; quite regardless of whether it was one ship or another that carried them, and quite regardless of the voyage the ship had made.

We believe there never has been a departure from this rule, until the decision was rendered which is now sought to be reversed. We can find no decision to the contrary in either American or English jurisdiction.

The cases cited by Mr. Benjamin in his work on Sales (5th Edition, pp. 588-9) supposed by many to be decisions denying the right of substitution of vessels, are not such decisions. We refer to:

Reuter v. *Sala,* Law Reports 1879, 4 Com. Pleas Div., 239;
Busk v. *Spence,* 4 Camp., 329 (1815);
Graves v. *Legg,* 1854, 9 Exch., 709.

Not one of them is a case against the use of one vessel rather than another. *All were cases where there was a plain violation of express language of the contract, either*

in respect to shipment, i. e., lading, or in respect to the declaration of vessels within the agreed period of time.

On the other hand, the decisions holding that the importer performing an f.o.b. contract calling for delivery at a certain American or English port, might make delivery off of any vessel which carried the goods, shipped on her in the time stated, form an unbroken line of authority from early times down to the present day and include about forty of the *Lamborn* cases.

Thornton v. *Simpson*, 6 Taunt., 556;

Ashmore & Co. v. *C. S. Cox & Co.*, Law Reports 1899, 1 Q. B. D., 436;

Harrison v. *Fortlage*, 161 U. S., 57;

Carver v. *Sassoon*, 17 Com. Cases, 57;

El Reno Wholesale Grocery Co. v. *Lamborn* and 28 other cases decided simultaneously therewith, Special Term, New York County, New York Law Journal, December 15th, 1920;

Telling-Belle Vernon Co. v. *Lamborn, et al.*, New York Supreme Court, New York County, New York Law Journal, December 22nd, 1920;

Central Sugar Co. v. *Lamborn*, 200 N. Y. Supp., 499; affirmed 195 App. Div., 909;

Pennsylvania Milk Products Co. v. *Lamborn* and six other cases decided simultaneously therewith, New York Supreme Court, New York County, New York Law Journal, January 4, 1921;

J. Hungerford Smith Co. v. *Lamborn*, 200 N. Y., Supp., 292;

Matthew Smith Tea, Coffee & Grocery Co. v. *Lamborn* and two other cases decided simultaneously therewith, District Court, Southern District of New York, 276 Fed., 325;

Lamborn v. *Log Cabin Products Co.*, 291 Fed., 435;

Lamborn v. *National Exchange Bank of Anderson, Indiana, United States District Court, District of Indiana*, ANDERSON, U. S. D. J.;

H. O. Wilbur Sons & Co. v. *Lamborn*, 276 Pa. State, 479;

Williams Ice Cream Co. v. *Lamborn and Chase National Bank*, 120 Misc., 301; 210 App. Div. 179;

Mann v. *Eastern Sugar & Products Co.*, 244 Mass., 100;

Gambrill Mfg. Co. v. *American Foreign Banking Corporation and E. R. Sherburne Co.*, 194 App. Div., 425;

Pennsylvania Sugar Refining Co. v. *Czarnikow Rionda Company*, Circuit Court of Appeals, Third Circuit, 245 Fed., 913;

Iasigi v. *Rosenstein*, 141 N. Y., 414;

Cunningham v. *Judson*, 100 N. Y., 179;

Matthew Smith Tea, Coffee & Grocery Co. v. *Lamborn* and two other cases decided simultaneously therewith, Circuit Court of Appeals, Second Circuit, 10 Fed. (2d), 697.

(Certiorari denied: 271 U. S. 683-685, 686.)

This rule thus firmly and widely established in American and English law, that an importer operating under a contract f.o.b. Port of Philadelphia or Port of London or Port of New York, may make delivery at said port from any available vessel, carrying the goods which were shipped in time, is not in conflict at all with the well known decisions of this Court and of England that the shipment of the goods must be in time, *i. e.*, the goods must be laden on board at the foreign port or wherever else the shipment was to be made, within the time speci-

fied by the contract and wholly within that time. We refer to such cases as

Bowes v. *Shand*, L. R. 2, App. Cases 455;
Filley v. *Pope*, 115 U. S., 213;
Norrington v. *Wright*, 115 U. S., 188.

In all of those cases facts were present showing that the seller had failed to make the agreed shipment. This, we submit, is an utterly different branch of the law. In *Bowes* v. *Shand*, the rice had been not wholly shipped within the designated months. In *Norrington* v. *Wright*, the rails had not been shipped in the designated quantities within the designated months; and in *Filley* v. *Pope*, the Scotch iron had not been shipped from the named port but from another than that stipulated in the contract. If the plaintiffs had shipped the sugar from India instead of from Java that case would have applied. But it had no relation to the subject-matter.

The opinion of the Fourth Circuit (by Circuit Judge Rose, 2 Fed. [2d], 23), affirmed and followed into final judgment by the decision of the Fourth Circuit in 15 Fed. 2nd 473, while refusing to follow the numerous English decisions on f.o.b. contracts and shipments, and the very many state and federal decisions directly on the Lamborn shipment clause under the Lamborn f.o.b. contracts, failed to cite a single authority either in American or English law, that Lamborn & Company had not the right to make delivery at Philadelphia of this sugar from the *West Cheswald* because her bill of lading contained the words "Port Said, option New York" covering destination, instead of the words "Philadelphia, Pa."

The words "Port Said, option New York" are testified to in the record before this Court as meaning this: That within a certain time of the arrival of the vessel at Port Said, Lamborn &. Company had under its bill of lading

the option to send this vessel to any other port, and that failing the exercise of the option she would then proceed as a matter of course to New York (Rec., pp. 47-48). So that when this ship was loaded at Java and proceeded towards Port Said, Lamborn & Company had the right, if they chose, to direct her to go to Philadelphia instead of New York. She was destined for no particular port but could go to any one. She was carrying Lamborn & Company's sugars, out of which they could make delivery at any port where they had agreed to deliver sugars so laden.

The objection to this is, we submit, so tenuous, indeed absurd, that it is difficult to discuss it. Mr. Justice WAGNER dismissed it as sophistry. (See *Williams Ice Cream Co.* v. *Lamborn*, 120 Misc. [N. Y.] 301.) District Judge GRONER said in substance that the objection involved injustice and unfairness (Rec., p. 51). The Second Circuit said bluntly that the ship performed the contract. (*Matthew Smith Tea, Coffee & Grocery Co.* v. *Lamborn*, 10 Fed. [2nd], 697). The Supreme Court of Pennsylvania said, in effect, that Lamborn had made no contract for a direct voyage, but that even if the Lamborn contract had called for a direct voyage from Java to Philadelphia, that court would not necessarily have held that the *West Cheswald* had failed to make such a direct voyage (*H. O. Wilbur Sons & Co.* v. *Lamborn, supra*).

But the Lamborn contract with T. S. Southgate & Co. and the shipment clause of the letter of credit issued by the defendant National Bank of Commerce *did not anywhere specify or stipulate for a direct voyage from Java to an American port.*

One reads the opinion of the Circuit Court, Fourth Circuit, again and again, in a vain attempt to find therein the substance of the objection.

The learned Circuit Judge who wrote that opinion did

attempt to formulate some basic ground, some sort of reason why he deemed it necessary to hold that we could not deliver from the *West Cheswald*. It is, we submit, if found anywhere, to be found in the following words:

> "Now it is true, as it is pointed out by the learned counsel for the seller that the contract here is not a c.i.f. contract, *but it is one under which the buyer had an insurable interest and is therefore one which so far as this question is concerned is governed by the same principle*" (Rec., p. 85). (Italics ours.)

But this stated reason is fallacious and were it not, it is entirely inadequate to change an f. o. b. contract Philadelphia into a c. i. f. contract Java port.

We submit that the purchaser of this sugar f.o.b. Philadelphia had no insurable interest *in the sugar* as long as it was Lamborn & Company's. It was our sugar until delivered aboard railroad cars at Philadelphia. The purchaser had no insurable interest in our goods.

But the purchaser, like any other purchaser, could have insured his *profits* (circumstances permitting it at the time of his application for such insurance) and on the retrial of this case petitioners by amendment and by competent expert evidence and documents under the amended notice of motion for judgment sought to prove that any right of the purchaser T. S. Southgate & Co. to insure its profits under its contract with Lamborn & Company was not in the least impaired by the nature of the bill of lading of the S. S. *West Cheswald* which carried the sugar or by her diversion off the coast of New Jersey to the port of Philadelphia there to make delivery. (See amended notice of motion for judgment, p. 95; see deposition of Richard Jones and exhibits attached, Rec., p. 176 *et seq.*)

So that if alleged interference with the purchaser's right to insure his profits was the reason, the basic ground for the decision of the Fourth Circuit, it was an error of fact.

It was controverted by the practice of insurance of profits, by the rules of the great insurance bodies of the Atlantic coast and of England, and it was controverted by the very forms and contents of binders and policies which are in use in the business of insurance of profits and which provide on their face for substitution of steamers and for diversion of the carrying vessel and her entering into other ports or making a different voyage. (See deposition of Jones and exhibits.)

We submit the Court will find in this record clear evidence on the subject of insurance of profits, clear evidence that the purchaser, T. S. Southgate & Company's right to insure profits (if they could have done so under the circumstances) was not prejudiced or impaired and could not have been prejudiced or impaired in the slightest degree by the nature of the bill of lading of the S. S. *West Cheswald*, by her stated designation Port Said, option New York, or by her diversion on the high seas to the port of Philadelphia.

We submit this error should no longer persist, and that this Court should correct it.

Nor is there a decision in the books (and counsel writing this brief have examined every reported case on the right and practice of insuring profits under a contract of purchase and sale which can be found in the English and American law books) which holds or has ever held that the purchaser under an f. o. b. contract, Philadelphia, such as the Lamborn contract in this case, had any right of insurance of the goods on board the vessel; nor is there a case in the books which holds (except the Circuit Court decision of the Fourth Circuit now under review) that the purchaser's right to insure his profits under a purchase and sale contract covering goods to be imported by the seller and delivered f. o. b. American port to the purchaser, was impaired or prejudiced in the slightest

degree by transshipment of the goods, by the port or ports of destination of the vessel or vessels, or by the ship's diversion from one port to another.

Counsel believe that no such case or cases exist.

The decision of the Fourth Circuit, ignoring *Harrison* v. *Fortlage, supra,* overruling District Judge HAND in *Matthew Smith Tea, Coffee & Grocery Co.* v. *Lamborn, supra,* and Mr. Justice SAWYER in *J. Hungerford Smith Co.* v. *Lamborn, supra,* and Mr. Justice WAGNER in *Williams Ice Cream Co.* v. *Lamborn, supra,* the Supreme Court of Pennsylvania in *H. O. Wilbur Sons & Co., Inc.* v. *Lamborn, supra,* and all the other cases which we have above mentioned defining the seller's obligation under f. o. b. contracts, is undoubtedly based on two things: (1) the principle decided in *Bowes* v. *Shand, Norrington* v. *Wright* and *Filley* v. *Pope,* that the shipment must be made in time at the specified place and in the specified quantity; and (2) on the assertion that the purchaser's right to insure the sugar, brought the case within the rule of c. i. f. contracts and was violated by the shipment made on the *West Cheswald.* (Although on the second appeal the Fourth Circuit, by ROSE, C. J., declared that evidence of the underwriting practice of insurance of profits was immaterial and had been rightly excluded on the second trial.)

There can be no doubt that the decision of the Fourth Circuit was written about the case of *Filley* v. *Pope.* It is a misapplication of that case.

There can be no doubt that the dictum in that case concerning insurance contained in the opinion of Mr. Justice GRAY, namely:

> "* * * the buyer would have an insurable interest in the iron during the voyage by reason of the title which would accrue to him under the con-

> tract on arrival and delivery and of the profits that he might make in case of a rise in the market. 3 *Kent's Commentaries*, 276; *French* v. *Hope Insurance Co.*, 16 Pickering 397; *Eastern Railroad* v. *Relief Insurance Co.*, 98 Mass. 420, 423."

was the cornerstone of said Fourth Circuit's decision. It follows that we must examine the source and origin of that dictum.

Chancellor KENT in 3 *Kent's Com.* 276, summarized the decision of the House of Lords in the case of *Lucena* v. *Craufurd*, 5 Bosanquet & Pullers 269, to the general effect that "commissions to become due to public agents and all reasonable expectation of profits, were insurable interests."

The Chancellor's distinguished Editor (6th Ed.), cited *Eastern Railroad Co.* v. *Relief Fire Insurance Co.*, 98 Mass. 420, 423. In this case the opinion of the Massachusetts Supreme Court was written by Justice GRAY. It was not an action on an insurance policy insuring profits. It was an action on a *fire* insurance policy insuring the railroad company against "their liability for loss and damage by fire occasioned by sparks from railroad engines to property of others situated on lands not owned or occupied by the insured."

In the course of his opinion in the case, Justice GRAY said:

> "By the law of insurance, any person has an insurable interest in property, by the existence of which he receives a benefit, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of the property itself. 3 *Kent's Com.* (6th ed.) 276; *Insurance Co.* v. *Chase*, 5 Wallace, 509, 513; *Wilson* v. *Jones*, Law Rep. 2 Exch. 150, 151."

Insurance Co. v. *Chase*, 5 Wallace, 509, need not be

discussed, as it was not a case of insurance of profits; *Wilson* v. *Jones*, Law Reports, 2 Exch., 139, was an action on an insurance policy taken out by a shareholder in the Atlantic Telegraph Company, involving the laying of the first submarine cable. *Lucena* v. *Craufurd*, was a case of the insurance of the commission for the sale of Dutch property under an English statute, 35 George III, Chapter 80, Section 21, Dutch ships actually seized under orders of the British Government. It had nothing to do with the insurance of profits. *French* v. *Hope Insurance Co.*, 16 Pickering, 397, was an action to recover on a policy of insurance. It is enough to say that the assured had bought and paid for a one-half interest in the cargo.

The foregoing being the real nature of the cases referred to by Mr. Justice GRAY when he read the decision in 1868 for the Supreme Court of Massachusetts in the case of *Eastern Railroad Co.* v. *Relief Fire Insurance Co.*, 98 Mass., 420, we find the same citations in the opinion of the Court in *Filley* v. *Pope*, namely: 3 *Kent's Commentaries*, 276; *French* v. *Hope Insurance Company*, 16 Pickering, 397, and *Eastern Railroad Co.* v. *Relief Fire Insurance Co.*, 98 Mass. 420.

And when the very learned and distinguished Justice came to write for the Court in *Harrison* v. *Fortlage*, he again cited, as authority for the alleged insurable interest, the same cases, namely: *Insurance Co.* v. *Chase*, 5 Wallace, 509-513; *Filley* v. *Pope*, 115 U. S. 213-220; *Wilson* v. *Jones*, L. R., 2 Exch. 139, 3 *Kent's Commentaries*, 276.

We very respectfully submit that the cases cited by Mr. Justice GRAY were not based on the practice and business of insurance of profits, did not involve any such contract and were not in a single instance a case where profits had been insured by a purchaser, and that, therefore, neither the dictum in *Filley* v. *Pope* nor the cases mentioned in connection therewith may properly be used

to sustain a judicial finding that the purchaser here or the Bank had an insurable interest in our sugar, which the bill of lading of the *West Cheswald* destroyed.

Now when we come to the plain fact that the purchaser's right to insure profits under this Lamborn contract and on any other contract like it, is not vitally concerned with the terms of the original loading or with the name of the ship or with its voyage or course, but that it stands unimpaired, whether it be one ship or another, whether there be a deviation or not, whether the name of the vessel be changed, it is apparent that the reason sought to be found in the subject-matter of insurance of profits by a purchaser for holding that there was an implied obligation in our contract, that the loading should be *originally for Philadelphia and that the ship should proceed direct to that port,* disappears.

POINT TWO.

Both State and Federal Courts, including the Second Circuit Court of Appeals, have construed Lamborn & Company's obligations under this shipment clause in accordance with the construction urged by us in Point One; and all these Courts have held that delivery of the commodity by Lamborn & Company from the steamship "West Cheswald" was a good delivery under that clause.

When Lamborn & Company in 1920 sold in this country the Java sugars purchased by them abroad, they prepared and used a uniform printed form of contract. This contract contained the following provisions as to shipment and delivery to their American customers:

> "F.O.B. cars Philadelphia, Pa., landed weights * * * Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia."

The contract between Lamborn & Company and T. S. Southgate & Company in the case at bar was upon this printed form and contained the said provision. The contracts with Matthew Smith Tea, Coffee & Grocery Company, with the Pennsylvania Milk Products Company and with L. Brenner Sons & Perloff, involved in the three cases in the Second Circuit, reported in 276 Fed. 325 and 10 Fed. (2d), 697, were likewise upon this printed form and contained the said provision.

The letter of credit issued by the National Bank of Commerce of Norfolk, Virginia, in the case at bar, which was supplied by T. S. Southgate & Company pursuant to said contract, likewise contained the said provision.

The sugar delivered to Matthew Smith Tea, Coffee & Grocery Company, to the Pennsylvania Milk Products Company and to L. Brenner Sons & Perloff, as well as to T. S. Southgate & Company, f.o.b. Philadelphia, all came from the same ship, *West Cheswald,* and had been carried by the *West Cheswald* from Java to Philadelphia under the same ocean bill of lading containing the clause:

"Port Said, option New York."

In the three cases in the Second Circuit, the respective banks which had issued the letters of credit duly honored them and paid Lamborn & Company's drafts; thereafter Lamborn & Company's customers, in order to assert their claim that Lamborn & Company had breached their contracts and had failed to deliver the sugar called for therein, brought suits against Lamborn & Company as for money had and received.

But in the case at bar, the National Bank of Commerce of Norfolk refused to honor its letter of credit and instructed the Bankers Trust Company of New York not to make payment under it. So that Lamborn & Company, as plaintiffs, brought the suit at bar against the National Bank of Commerce of Norfolk, Virginia.

The sole ground for denying Lamborn & Company a recovery herein was that, as the Fourth Circuit held, Lamborn & Company had failed to comply with the shipment provision of said letter of credit above quoted in that the sugar covered by the documents presented to the defendant Bank had not been shipped "from Java to Philadelphia" but had been shipped on the *West Cheswald* under an ocean bill of lading reading "Port Said, option New York."

The Court will observe on examining the record of the case that the Bankers Trust Company, after examination, declared that Lamborn & Company's documents, among which was the said bill of lading, were "in order" and so advised the National Bank of Commerce of Norfolk, and strongly urged the defendant Bank to honor its letter of credit and to permit the Trust Company in New York to make due payment thereunder (Plaintiffs' Exhibits 227 and 229, Rec., pp. 146 and 148).

When the three cases above referred to came on to be heard in the Circuit Court of Appeals, Second Circuit, that Court had before it the first decision (2 Fed. [2d], 23) of the Fourth Circuit in the case at bar, and it was urged upon that Court that Lamborn & Company had failed to comply with the shipment provision of the contract for the reasons stated by Circuit Judge ROSE in that opinion.

But the Second Circuit refused to hold that Lamborn & Company had breached its contract. On the contrary the Second Circuit held that Lamborn & Company had performed it; that the shipment on board the *West Cheswald* was a shipment from Java to Philadelphia, hence that Lamborn & Company was entitled to retain the purchase money of the sugar. Circuit Judge HOUGH said:

> "Reduced to its lowest terms, Smith Company was entitled to a certain quantity of Java sugar f.o.b. Philadelphia, and shipped in August-September; that agreement was fulfilled."

Following the decision of the United States Circuit Court of Appeals, Second Circuit, in the three cases *Matthew Smith Tea, Coffee & Grocery Co.* v. *Lamborn, Pennsylvania Milk Products Co.* v. *Lamborn* and *L. Brenner Sons & Perloff* v. *Lamborn*, the plaintiffs in those cases petitioned this Court to issue writs of certiorari to review the judgment of the Second Circuit. This Court denied the petitions (271 U. S. 683, 685 and 686).

The decision of the United States Circuit Court of Appeals, Second Circuit, to which we have referred was one affirming the decision in the United States District Court for the Southern District of New York, made by U. S. District Judge LEARNED HAND, now of the Circuit Court, and reported in 276 Fed. 325.

In the Supreme Court of the State of New York, our delivery off the *West Cheswald* under this form of contract and shipment clause has been held good. Thus, in the case of *Williams Ice Cream Co., Inc.*, v. *Chase National Bank and Lamborn & Company*, 120 Misc. 301, modified and complaint dismissed with costs, 210 App. Div. 179, the contract was likewise upon the same printed form as in the case at bar and contained the same shipment clause.

The identical objection against the legality of delivery from the *West Cheswald*, which was held fatal by the Circuit Court of Appeals, Fourth Circuit, was presented to the New York Supreme Court. But the Special Term (Mr. Justice WAGNER presiding) held the point of no weight. He said, at page 305:

> "Plaintiff urges that the sugar was not a shipment from Java to Philadelphia, but to New York; * * * In other words, that a shipment is not the course that a designated vessel takes, but a course intended that it should take. This refinement to me seems more one of sophistry than reason and carries with it failure of conviction."

Mr. Justice WAGNER dismissed the complaint, but without costs (120 Misc. 301). Upon appeal to the Appellate Division, however, the judgment was modified so as to dismiss the complaint with costs, and as thus modified, affirmed (210 App. Div. 179).

Again, Mr. Justice SAWYER of the New York Supreme Court, at Special Term at Rochester (Monroe County), decided that Lamborn & Company had the right to make delivery of these sugars from the *West Cheswald*: See *J. Hungerford Smith* v. *Lamborn*, 200 N. Y. Supp. 292.

Again, in a case which came before him at Special Term of the Supreme Court, New York County,

> *Telling Belle Vernon Co.* v. *Lamborn*, New York Law Journal, December 22nd, 1920,

Mr. Justice COHALAN, in denying an injunction to restrain Lamborn & Company from collecting against a letter of credit, held in substance and effect that a delivery of sugar from the S. S. *West Cheswald* was lawful and in compliance with the contract.

A similar decision was handed down by Mr. Justice BENEDICT sitting at Special Term, Kings County, in the case of

> *Central Sugar Co.* v. *Lamborn*, 200 N. Y. Supp. 499; affirmed without opinion 195 App. Div. 909.

Again, in eight cases which came before him at Special Term, New York County, Mr. Justice BURR (afterward of the Appellate Division, First Department) in denying injunctions against Lamborn & Company, held that deliveries of sugar from the said S. S. *West Cheswald* complied with the contracts:

> *Pennsylvania Milk Products Co.* v. *Lamborn;*
> *L. Brenner Sons & Perloff* v. *Lamborn;*

Mollen-Thompson & James Co. v. *Lamborn;*
Matthew Smith Tea, Coffee & Grocery Co. v. *Lamborn;*
T. H. McLain Grocery Co. v. *Lamborn;*
W. E. Sheppard & Co. v. *Lamborn;*
T. S. Southgate & Co. v. *Lamborn* (Action No. 2);
Williams Ice Cream Co. v. *Lamborn.*

(All reported in New York Law Journal, issue of January 4th, 1921.)

Again, in Pennsylvania, the State of delivery, the same contention was made in the case of

H. O. Wilbur Sons & Co. v. *Lamborn,* 276 Pa. State 479.

The contract was upon the same printed form and contained the same shipment clause which we have described. There it was argued with great learning and ability through all the courts of Pennsylvania that Lamborn & Company could not lawfully make delivery of said sugar at the port of Philadelphia from the said S. S. *West Cheswald* owing to the nature and contents of her bill of lading. But once more the point was held not to have been well taken, the Supreme Court of Pennsylvania saying:

> "Some point is made * * * of the fact that the *West Cheswald* was originally bound for New York and diverted to Philadelphia. We think this diversion was of no consequence, under the contract. Plaintiff was concerned only with the delivery of the merchandise, that there should be no delay in its arrival. It was delivered as the result of a continuous voyage from Java to Philadelphia. These contracts do not say that the sugar shall be shipped by continuous voyage from place of shipment to destination, what they provide is that the shipment shall be 'from Java by steamer or steamers to Philadelphia.'"

The same view thus expressed by the courts of New York, and Pennsylvania was taken by United States District Judge D. LAWRENCE GRONER upon the first trial of the case at bar. He said:

> "* * * the letter of credit is complied with, it seems to me, by the shipment in a reasonable time, of course, from Java and the arrival within a reasonable time at Philadelphia. I can't imagine that the contract contemplates or requires that there must have been all the time, from the inception of the voyage, the intention and purpose to send the vessel to Philadelphia. If the intention occurred and was consummated by the act itself any time after the voyage commenced, it seems to me that it would be a compliance with the contract. It would be all that reason and fair play and justice would require" (Rec., p. 51).

It remains for us to say that the decisions of those Courts on this precise question were not by any means inadvertent. In every one of those cases, able counsel presented with the utmost ingenuity and learning all the arguments and cited all the cases which were proffered by our distinguished opponent in the case at bar and adopted by the Circuit Court of Appeals, Fourth Circuit. All those other Courts rejected the contention.

The issue is clear cut. For if the opinion and decision of the Circuit Court of Appeals, Fourth Circuit, in the case at bar is sound law, then the Supreme Court of the State of New York, the Supreme Court of the State of Pennsylvania, the District Court of the United States for the Southern District of New York, the District Court for the Eastern District of Virginia and the United States Circuit Court of Appeals for the Second Circuit have all decided erroneously and a body of law regarding shipment arising under the Lamborn contracts throughout the United

States, which has grown up during the last seven years is erroneous and must be wiped out from the reports.

We submit, that a decision of a single court must be sound and unimpeachable indeed that compels this Court to overrule so many other learned courts and judges.

That the judgments below are opposed to all other judicial authorities on this question must, we think, be conceded; and that the judgments impede commerce, both foreign and domestic, while the other authorities facilitate it, must we think also be conceded.

Most shippers and importers do not control the vehicle of transportation. Rarely, if ever, does the item of goods bought and sold comprise a whole cargo or even fill a single freight car; and hardly any ship except the crack passenger liner finds it possible to make an uninterrupted voyage.

We have not argued in this brief other errors in the judgments under review such as:

a. The rejection of our proposed amendment to the plaintiffs' notice of motion for judgment on the second trial (Rec., pp. 103-106);

b. The consequent exclusion of our proffered evidence and testimony on trade custom showing the accepted understanding of the meaning of the shipment clause in the letter of credit (Rec., pp. 164-175);

c. The consequent rejection of our testimony and evidence concerning the business and practice of insurance of profits (Rec., pp. 176-200);

d. The overruling of plaintiffs' contention that the defendant Bank was estopped from objecting to the form of Lamborn & Company's bill of lading of the sugar on the *West Cheswald* because the Bank did not raise the objection during the lifetime of the letter of credit but made other and

different objections; whereas had it made the objection on which it has succeeded, we could have shipped against the said letter of credit sugar to the purchaser Southgate & Company shipped from Java on the S. S. *Washington Maru* during the contract months, which was carried to Philadelphia under a bill of lading reading:

"From Surabaya to Philadelphia"

(Rec., pp. 154-157; Plaintiffs' Exhibit 235, p. 120).

We consider those errors to be entirely subordinate to the great error of the Court below in finding any breach of contract on our part in the form or contents of the bill of lading for our goods on the *S. S. West Cheswald* wherein the Court below has set itself in opposition to all the other recorded decisions of American and English courts so far as our diligence has discovered them to exist. For regardless of other errors, if the plaintiffs are right in their claim as to the meaning of their contract, and if the Courts of New York and Pennsylvania and certain United States Federal Courts are right in sustaining that claim and construing this shipment clause as having been fully performed by the plaintiffs, the decision and judgment of the United States Circuit Court of Appeals, Fourth Circuit, in the case at bar must be reversed, and the existing law on this subject of performance of an f. o. b. shipment contract, which prevails (except in the Fourth Circuit) wherever the English Common Law is the law of the land, must be given the final sanction of this Court.

POINT THREE.

The decisions and judgments of the United States Circuit Court of Appeals, Fourth Circuit, in the case at bar, should be reversed and the case remanded to the District Court of the United States for the Eastern District of Virginia for further proceedings in accordance with the opinion of this Court.

Respectfully submitted,

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